Petition

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81-352

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

REGINALD LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, in light of this Court's ruling in *Faretta v. California*, 422 U.S. 806 (1975), that an accused may waive his right to counsel and proceed *pro se*, an accused, also, may elect to be represented by retained counsel of his choice if he knowingly and intelligently waives his right to effective representation under the Sixth Amendment.

II. Whether an accused's right to be represented by counsel of his choice under the Sixth Amendment overrides the trial court's supervisory responsibility to protect against potential ethical violations by counsel who practice before it, so long as the accused is willing to make a knowing and voluntary waiver of that known potential violation and possible resulting ineffective representation.

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REGINALD LEWIS,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Reginald Lewis, the petitioner herein, prays that a writ of certiorari issue to review the judgment of District of Columbia Court of Appeals entered in the above-entitled case on May 5, 1980.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals, attached hereto as Appendix A, is reported in 430 A.2d 528 (1981). The Order denying the petition for rehearing and/or rehearing *en banc* was entered on June 24, 1981, is set forth in Appendix B and is not reported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on May 5, 1981 (Appendix A, *infra*). The Court of Appeals denied petitioner's petition for rehearing and/or rehearing *en banc* (Appendix B, *infra*) on June 24, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED

United States Constitution:

AMENDMENT VI–JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

District of Columbia Court of Appeals Rules and Code of Professional Responsibility

Relevant portions are printed in Appendix C, at 16a-20a, *infra*.

STATEMENT OF THE CASE

Petitioner, Reginald Lewis ("Lewis"), and a co-defendant, Arthur Byrd, were arrested on August 5, 1975 and charged, *inter alia*, with four counts of first degree murder and four counts of felony murder. The court appointed Charles Kubinski, Esquire ("Kubinski"), to represent petitioner. On March 5, 1976 Kubinski sought leave to withdraw solely because he had witnessed the detective in charge of the investigation berate a potential defense witness for failing to make an identification at a lineup and, therefore, Kubinski had become a possible defense witness. As a result of Kubinski's withdrawal, the March 5, 1976 trial date was postponed.

After the trial judge permitted Kubinski to withdraw, she appointed Frederick C. Timberlake, Esquire ("Timberlake"), to represent the petitioner, and scheduled trial for June 1, 1976, nine weeks later.

One week after the court assigned Timberlake, he met with the petitioner, who was incarcerated, for no more than forty-five minutes to one hour. Lewis and Timberlake discussed possible witnesses who would establish that Lewis was at work at the time of the homicides and who knew that, prior to the homicides, Lewis or his family owned jewelry and coins which the government would assert at trial belonged to one of the victims and, therefore, linked Lewis to the murders.

Since the petitioner was incarcerated, the only way in which he could keep abreast of Timberlake's progress in investigating and preparing his case was through Timberlake's communicating with petitioner by correspondence or visiting Lewis. During the month of April, 1976, Timberlake made no effort to communicate with petitioner. By May, 1976, trial was less than one month away, and since Lewis had not heard from Timberlake, he twice tried to telephone Timberlake. Both his phone calls went unanswered and unreturned. Petitioner wrote Timberlake to learn the status of his investigation and preparation. As with his phone calls, Lewis' letters went unanswered.

With the trial date rapidly approaching and unable to contact his lawyer, Lewis had his mother, Sophia Lewis, try to contact Timberlake for him. Though she called a number of times, Timberlake also never returned her phone calls. Finally, using her daughter's married name, Mrs. Lewis was able to speak with Timberlake by phone. His attitude appeared to her to be one of disinterest and unconcern.

Timberlake's attitude, both expressed in conversation with Mrs. Lewis and implicit in his failure to respond to the petitioner, indicated a lack of interest and preparation. Apparently spurred by Mrs. Lewis' telephone call in May, Timberlake interviewed Lewis at the jail one more time. This visit lasted for twenty to thirty minutes, and confirmed Lewis' belief that Timberlake was unprepared and unconcerned. Lewis learned that, with less than a month before trial, Timberlake had neither interviewed Lewis' witnesses nor had he investigated the case. With a June 1 trial date, Lewis was presented with the dilemma of either going to trial with an unprepared, unconcerned attorney or finding new representation.

During the middle of May, six weeks after Timberlake's appointment, Mrs. Lewis began to search for new counsel for her son; however, the search was extremely difficult. Lewis was charged with four capital offenses; there were numerous complex legal and evidentiary issues involved in the case; and the trial was scheduled to last for up to two weeks. Furthermore, Mrs. Lewis was a cleaning woman and had extremely limited financial means.

On May 24, 1976 she retained the firm of Roundtree, Knox & Parker, who filed a motion for leave to enter its appearance as Lewis' attorney. There was no hearing of record on this motion until the date of trial, June 1, 1976, when Parker on behalf of the firm sought leave to withdraw its appearance.

The trial court did not inquire into Lewis' reasons for retaining new counsel. Although both the government and Timberlake were given an opportunity to object to the withdrawal, the court never addressed the petitioner, who was never given the opportunity to object or consent.

Motions to suppress identifications and tangible evidence were heard on June 2, 1976. Timberlake's performance during these motions only reinforced petitioner's fears that he was not going to be zealously represented. Timberlake admitted he was unprepared for the motions; he stated to the trial court that he had not fully checked the court files; and he was unaware that motions had not been filed on behalf of the petitioner. At that point Timberlake simply joined in the motions previously filed on behalf of the co-defendant. Timberlake called no witnesses. He made only cursory arguments, cross-examined only two of the seven government witnesses, and those in a perfunctory manner, and

failed to make arguments which would have advocated the defendant's cause.[1]

On the morning of June 3, 1976, prior to the start of voir dire and the jury trial, Meyer Koonin, Esquire ("Koonin"), informed the trial court that he was entering his appearance on the appellant's behalf. (Tr. 200). Koonin requested a continuance for a reasonable length of time—"or a few days"—so he could acquaint himself with the facts of the case. (Tr. 200-203). After listening to the government's argument opposing the continuance, the trial court denied Koonin's request for a continuance. This denial was made without any inquiry by the court of Koonin or the petitioner as to the reasons for either Koonin's appearance or his request for a continuance. (Tr. 200-203). The trial court, after denying the continuance, then asked if Koonin still wanted to enter his appearance. (Tr. 203). When he said he did the court placed the following restrictions on his representation:

> THE COURT: All right, Mr. Koonin, I will permit you to enter an appearance in this case, but Mr. Timberlake, who was appointed by this Court, remains major counsel . . . .
>
> You may confer with Mr. Timberlake by written note during recess. You may not examine witnesses during the course of the trial and you may not consult with me at the bench. You may approach the bench, but Mr. Timberlake will be major counsel, and it is so ordered.
>
> MR. KOONIN: I believe Your Honor has ruled I cannot participate in this case. (Tr. 203-204).

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[1] E.g., Timberlake conceded a motion for severance where valid arguments existed to justify a separate trial.

After the court's voir dire of the jury, Koonin requested that an additional question be asked of the panel. Without going into the substance of Koonin's request, the court stated:

> [A]s I indicated to you, you may enter your appearance and you may sit at counsel table, but you are not to address me. Mr. Timberlake is counsel, chief counsel in this case, and you are to address Mr. Timberlake and I'm sure Mr. Timberlake will bring to my attention those things he considers essential.
>
> The Court has stated what its practice is. (Tr. 210).

Timberlake then failed to reiterate Koonin's point. As stated by Chief Judge Newman in his dissent in the opinion below, "the severe restrictions imposed by the trial court . . . truly crippled retained counsel." *Lewis v. United States,* 430 A.2d 528, 533 n.1 (D.C. App. 1981) (Newman, C.J., dissenting), Appendix A at 12a, *infra.* After the midday recess, Koonin withdrew, stating he had been effectively denied the opportunity to represent petitioner. The court permitted his withdrawal.

Immediately thereafter the co-defendant's attorney, at a bench conference, informed the court that Lewis still desired Koonin as his lawyer. Prior to the start of trial, the next morning, the petitioner also told the court he wanted Koonin as his counsel. On both occasions the court stated the problem was no longer within its control.

The trial concluded on June 10, 1976. Timberlake never called the witnesses who worked with Lewis and who could have established an alibi defense, nor did he submit time cards which would have established the petitioner's presence at work during the time in question. Timberlake did not call a witness who the petitioner

testified knew that prior to the homicides he owned a gold coin, allegedly belonging to one of the victims, which thereby allegedly linked him to the homicides. Timberlake explained this failure on the basis that he did not learn about the coin until the Thursday or Friday before trial and did not have enough time to locate the witness, since the trial began the following Monday. Timberlake never made this fact known to the trial court and never requested a continuance despite his notification at such a late date of such critical evidence.[2]

Lewis was convicted of four counts of first degree murder while armed, four counts of first degree felony murder, one count of first degree burglary and two counts of armed robbery. Petitioner's effective sentence is 140 years to life.

The District of Columbia Court of Appeals decision affirming petitioner's conviction is a split decision and reflects a conflict between the right of a defendant to be represented by counsel of his choice and the responsibilities of the trial court to supervise the conduct of lawyers who appear before it. The majority found that the trial court's duty to prevent violations of the Canons of Ethics outweighed the constitutional right of a defendant to have counsel of his own choosing even if he was willing to waive his right to later allege he was denied effective assistance of counsel. This split is further reflected in the decision denying rehearing and/or rehearing *en banc*, with three judges dissenting.

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[2]These and other matters regarding Timberlake's representation were explored in a post-conviction hearing prior to the petitioner's appeal to the District of Columbia Court of Appeals. The trial court held Timberlake's performance did not amount to such "gross incompetence" as to deprive the petitioner of the essence of a substantial defense, the standard prevailing in the District of Columbia for a finding of ineffective assistance of counsel.

In his dissent to the panel decision, Chief Judge Newman, relying upon *Faretta v. California*, 422 U.S. 806 (1975), and *Cuyler v. Sullivan*, 446 U.S. 335 (1980), found that the trial court owed a greater duty to protect a defendant's choice of counsel, so long as the defendant knows the risks inherent in such a choice and intelligently makes his decision. Furthermore, he noted that the Court of Appeals in the District of Columbia has delegated to the Bar the power and responsibility to decide whether a lawyer has violated his professional obligations. This power, he noted, does not lie with the trial court. *See* D.C. Appellate Rule XI, § 4(3), Appendix C at 17a, *infra*.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW DENYING THE ACCUSED THE RIGHT TO PROCEED TO TRIAL WITH COUNSEL OF HIS CHOICE AND WAIVE HIS RIGHT TO EFFECTIVE ASSISTANCE IS CONTRARY TO THE STANDARDS SET BY THIS COURT AND THE HOLDINGS OF ALL THE CIRCUITS WHICH HAVE CONSIDERED THIS ISSUE OTHER THAN THE THIRD CIRCUIT.

The decision below is in direct conflict with both the decisions of a majority of the courts which have faced this issue as well as with the fundamental underpinnings of the decisions of this Court. Under the holding of the District of Columbia Court of Appeals in this case, an accused's right to select and retain counsel of his choice is subordinate to the trial court's power to supervise the practice and appearance of the attorneys who appear before it. Contrary to this Court's recent holding in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the court below held that an accused may not waive his right to effective

assistance of counsel in order to effectuate his right to be represented by counsel of his choice. If allowed to stand, the decision below establishes authority for the erroneous doctrine that a trial court may deny an accused his right to be represented by counsel of his choice and instead may substitute the court's judgment as to counsel for the accused's desire. "[W]hether or not that [retained] attorney enjoys the confidence of the court, are considerations wholly irrelevant to the constitutional issues confronting the trial court. It is the *defendant's* confidence which is at stake, not that of the court." *Magee v. Superior Court*, 506 P.2d 1023, 1025, 106 Cal. Rptr. 627 (Cal. 1973) (emphasis in the original).

This Court has established that a fundamental component of the right to effective assistance of counsel is the concomitant right to waive that right if the waiver is knowing and voluntary. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). In *Faretta v. California*, 422 U.S. 806 (1975), this Court held that a defendant may completely waive his right to effective assistance of counsel and proceed *pro se*. That decision recognized that the right to present a defense to a criminal charge is a personal right and that the accused is permitted under the Sixth Amendment to manage his own defense even to the point where he may dispense with counsel altogether.

> The right to defend is personal. The defendant and not his lawyer or the State will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.

Id., 422 U.S. at 834-835. *Faretta* expressly holds that the individual right to control one's defense takes prece-

dence over all other considerations, and that the court, no matter how well intended, may not deny that right or substitute its judgment for that of the defendant, even though "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.*, at 834.

Five years after its decision in *Faretta v. California, supra,* this Court again confronted the issue of the limits in the defendant's choice in retaining counsel. In *Cuyler v. Sullivan, supra,* this Court again reaffirmed the right of the individual accused to make the fundamental decisions concerning his legal representation and the management of his defense. This Court held, in a case involving multiple representations, potential conflicts arising therefrom, and the duty of a trial court to raise these issues sua sponte: "Absent special circumstances, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." *Id.*, at 347. While this Court has ruled that an accused may waive counsel altogether, and, in *Cuyler,* has indicated that an accused may waive a conflict due to multiple representations, it has never considered nor ruled on the accused's ability to knowingly choose retained counsel and by so doing waive his right to effective representation as to possible inadequacies in that representation of which the defendant is aware.

As a result of this silence, there exists significant conflict among the courts and the Circuits. The Second Circuit ruled in *United States v. Bubar,* 567 F.2d 192 (2d Cir. 1977), *cert. denied* 434 U.S. 872 (1977), that a defendant is entitled to retain counsel of his choice even if that counsel is in the opinion of the trial court less

skilled and less experienced than the court-appointed attorney. "What the Supreme Court said in *Faretta v. California,* in upholding a defendant's constitutional right to conduct his own defense, strikes us as applicable a fortiori to a defendant's right, as here, to choose between counsel, provided he does so knowingly and intelligently." *Id.,* at 204; *see, also, United States v. Lespier,* 558 F.2d 624 (1st Cir. 1977); *Releford v. United States,* 288 F.2d 298 (9th Cir. 1961); *Zuck v. Alabama,* 588 F.2d 436 (5th Cir. 1979); *United States v. Cox,* 580 F.2d 317 (8th Cir. 1978), *cert. denied,* 439 U.S. 1079 (1979); *Magee v. Superior Court, supra.*

In contrast to the holdings of the First, Second, Fourth, Eighth and Ninth Circuits as well as the California Supreme Court, the Third Circuit and the Court below (relying heavily on the authority of the Third Circuit) have taken the position that a trial court can substitute its judgment for that of the accused as to who will represent the defendant, counsel of his choice or counsel chosen by the court. In *United States v. Provenzano,* 620 F.2d 985, 1004 (3d Cir. 1980), *cert. denied* ___ U.S. ___, 101 S. Ct. 267 (1981), the Third Circuit recognized that the defendant was aware that there was a conflict between his chosen and retained attorney's representation of him and the attorney's prior representation of a government witness, and that the defendant ". . . was willing to waive effective representation, as the price for retaining [his chosen counsel]." Yet the trial court denied the defendant the right to make that waiver and to proceed with his retained counsel. In affirming the trial court's decision, the Third Circuit held, "Nevertheless, there is no absolute right to a particular counsel where there is an actual conflict of interest." *Id., Accord, United States v. Dolan,* 570

F.2d 1177 (3d Cir. 1978); *United States v. Bendetti*, 498 F. Supp. 450 (D.N.J. 1980).

In the case at bar, the trial court denied the accused the right to be represented by the counsel of his choice, because the trial court believed that counsel to be unprepared. Lewis' doubts and reservations concerning the preparedness and zealousness of his appointed counsel were so strong that he preferred to go to trial with a freshly retained counsel, possibly unfamiliar with the case, rather than proceed with the appointed attorney. This the trial court refused, and instead required Lewis to go to trial with his appointed attorney and effectively silenced Lewis' retained counsel. In affirming that result, the District of Columbia Court of Appeals joined the Third Circuit in permitting the trial court the power to forbid a defendant from waiving his right to effective counsel and, instead, forced an attorney of the court's choosing on the accused.

As Chief Judge Newman noted in his dissent, the decision below effectively turns its back on this Court's ruling in *Faretta* and its progeny and once more allows the trial court to seize control of the defendant's defense. Furthermore, as Judge Newman pointed out, if under *Faretta* Lewis would have been permitted to proceed *pro se* and waive all rights to counsel, it is illogical to hold that Lewis could not elect to proceed with trained counsel, even if he was unfamiliar with the case, and receive the benefit of his legal advice:

> [A]n experienced and skilled practitioner of the law, even though totally unfamiliar with the facts of a given case, will in all likelihood be able to provide far more competent assistance than a defendant would otherwise receive by virtue of his own untutored labors. Particularly with respect to

> questions of evidentiary admissibility, the propriety of the prosecution's opening and closing statements, the types and manner of questions to be asked of witnesses on cross-examination, and the requesting of proper jury restrictions, the guiding hand of such counsel should prove to be far more effective than the defendant's own unaided efforts. Since a defendant may constitutionally elect to rely solely upon his own inadequate legal skills in defending himself, there is no reason why he may not elect to retain counsel whose skills—notwithstanding charges of ineffectiveness—are likely to be superior to his own.

Lewis v. United States, 430 A.2d 528, 532 (D.C. App. 1981) (Newman, C.J., dissenting), Appendix A, at 10a, *infra.*

This analysis is not merely a simple academic exercise. Rather it goes to the fundamental concept that an accused should be allowed to defend himself and manage his own defense. If the decision below is allowed to stand, Reginald Lewis will spend the rest of his life in prison without ever having had, in any real sense, his "day in court." Rather than go to trial represented by counsel of his choice in whom he had confidence, Lewis was forced to rely upon an attorney not of his choosing in whom Lewis had no faith and who had demonstrated to Lewis that he would not zealously represent Lewis. It is ironic that the very ethical problem the trial court had with Koonin was that Koonin was recently retained and was unfamiliar with the case. The very reason for Lewis' decision to retain Koonin was that Lewis believed his court-appointed attorney was unprepared and unfamiliar with the case. By denying petitioner the right to be represented by his chosen counsel, the trial court denied Lewis his right to counsel altogether:

> An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

Faretta v. California, supra, at 821 (emphasis in original).

II.

THE DECISION BELOW IMPROPERLY SUBORDINATES THE ACCUSED'S SIXTH AMENDMENT RIGHT TO BE REPRESENTED BY COUNSEL OF HIS CHOICE TO THE TRIAL COURT'S RESPONSIBILITY TO SUPERVISE THE ATTORNEYS PRACTICING BEFORE IT TO AVOID POTENTIAL ETHICAL VIOLATIONS.

This Court should grant certiorari to clarify the role of the trial court in balancing its duties to supervise the attorneys who practice before it while respecting the accused's right to counsel of his choice. In the instant case, the trial court barred retained counsel from taking an active role in this case because it believed that there could be a possible ethical violation if Koonin were allowed to proceed. Specifically, the trial court was concerned with possible violations of EC 2-30 ("Employment should not be accepted by a lawyer when he is unable to render competent service . . .") and DR 6-101 (which prohibits a lawyer from accepting employment he is not competent to handle and as to which he has not had adequate preparation) of the ABA Code of Professional Responsibility (which is incorporated into the District of Columbia Court of Appeals Rule X).

This rationale, however, conflicts completely with the defendant's ability to select his own counsel. By

permitting the trial court to make that judgment, rather than to leave it to the disciplinary arm of the court, the trial court becomes the final arbitrator of who will represent the defendant. In reality the personal opinions and judgments of the court will supplant the desires of the accused whose freedom is in jeopardy and may lead to the exclusion of qualified counsel by the trial court, as in the case of *Magee v. Superior Court*, 506 P.2d 1023, 106 Cal. Rptr. 627 (Cal. 1973).

In *Magee v. Superior Court* the trial court refused to allow the appearance on behalf of the defendant of former United States Attorney General Ramsay Clark, on the grounds that he was not personally known to the court, did not enjoy the court's personal confidence, and was not known to the court to be qualified. The California Supreme Court rejected this reasoning, and said: "Whether or not the court is personally acquainted with the attorney to be associated, or whether or not that attorney enjoys the confidence of the court, are considerations wholly irrelevant to the constitutional issues confronting the trial court. It is the *defendant's* confidence which is at stake, not that of the court." *Id.* at 1025 (emphasis in original).

Other courts have recognized a defendant's right to waive effective assistance and to retain counsel who is either unwilling or incapable of adequately representing him at trial. For instance, in *United States v. Lespier*, 558 F.2d 624 (1st Cir. 1977), the First Circuit said that a defendant may constructively waive effective assistance of counsel by endorsing the conduct of a retained attorney who is clearly unwilling to provide effective assistance. *See also Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976) (refusal without cause to

proceed to trial with appointed counsel is a "voluntary" waiver of right to effective assistance).

Here, the court was aware for at least ten days prior to the trial that Lewis both desired and made attempts to retain counsel rather than proceed to trial with appointed counsel. The trial court's action in refusing to allow Koonin to actively participate as Lewis' primary counsel, and its denial of a continuance was not only totally oblivious to Lewis' dissatisfaction with Timberlake, but it also forced on the petitioner an attorney who was solely the preference of the trial court.[3]

Such a situation was considered in *Releford v. United States*, 288 F.2d 298 (9th Cir. 1961). There, three days before trial the defendant informed the court he would require a two-week continuance because of the sudden illness of this counsel. The court denied the continuance, and refused to allow the defendant time to select another attorney. Instead, the court appointed an attorney against the defendant's wishes. The Ninth Circuit found a clear abuse of discretion, explaining that although a continuance until the retained counsel could be present was not necessarily warranted, forcing an unwanted attorney on the defendant was a "complete disregard of the defendant's rights to choose his own counsel". *Id.* at 302. Permitting a court to force its preference of counsel on an unwilling defendant presents the judicial process with the potential for the complete destruction of an individual's due process rights within the judicial system.

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[3]It is important to note that Lewis' appeal was not grounded on the denial of Koonin's continuance. After the continuance was denied Koonin asserted he was prepared to proceed to trial. Therefore, this is not a case where it can be argued Koonin's services were sought for dilatory purposes.

The decision below was premised erroneously on the trial court's responsibility to police the trial bar. As pointed out by Chief Judge Newman in his dissent:

> The Court in *Cuyler* implicitly recognized that though a defendant may be entitled to counsel of his choice, even if that counsel is ineffective, the fact that the defendant has waived *his* right will not necessarily release the lawyer from his own obligations under the professional code. If the lawyer does violate those obligations it is not generally within the purview of the court to forestall him—for the court's primary obligation is to ensure that the defendant's constitutional right to counsel of his own choosing be protected, at least where it is a choice knowingly and intelligently made. Rather, it is for the appropriate Bar Committee to decide whether a lawyer has violated his professional obligation and to take the requisite disciplinary actions.

Lewis v. United States, supra, 430 A.2d at 532, Appendix A, at 8a-9a, *infra.*

Whether an attorney violates his duty under Canon 7 of the Code of Professional Responsibility to represent his client zealously and his duty to be prepared under DR 6-101(A)(1) and (2) would depend upon the specific circumstances and exigencies of the need for his representation. Though a lawyer sought by a defendant shortly before trial may be confronted with an ethical decision not to take the case because of lack of familiarity he would likewise be confronted with the ethical dilemma of denying that defendant zealous representation. A defendant's willingness to enter such a relationship with his "eyes open" would be a relevant factor in maintaining the integrity of the judicial process. Further, such a determination should be for the Bar to review, with full

knowledge of all the factors, not for the court which because of its role in either fact-finding or sentencing might not be in a position to gather all the relevant information concerning the defendant's decision to switch counsel.

This Court should take this opportunity to affirm the role of the trial court to insure that the accused does not inadvertently or unknowingly waive his right to ineffective assistance of counsel, and clarify that the trial court should not attempt to substitute its choice of counsel for that of the defendant's.

CONCLUSION

On the basis of the foregoing, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 11209, 79-348

REGINALD A. LEWIS,
a/k/a Maurice Contee,
Appellant,

v.

UNITED STATES,
Appellee.

Argued March 19, 1980 Decided May 5, 1981

Geoffrey P. Gitner, Frederick C. Timberlake and Robert Case Liotta, Washington, D.C., for appellant.

Elliott R. Warren, Asst. U.S. Atty., Washington, D.C. with whom Carl S. Rauh, U.S. Atty., Washington, D.C., at the time the original brief was filed, Charles F. C. Ruff, U.S. Atty., John A. Terry, Peter E. George, Michael W. Farrell and Carol E. Bruce, Asst. U.S. Attys., Washington, D.C., were on briefs, for appellee.

Before NEWMAN, Chief Judge, KELLY, Associate Judge, and GALLAGHER, Associate Judge, Retired.*

*Judge Gallagher was an Associate Judge of the court at the time of oral argument. His status changed to Associate Judge, Retired, on February 27, 1981.

PER CURIAM:

Appellant was convicted of first degree murder while armed,[1] first degree felony murder,[2] burglary,[3] and armed robbery.[4] He appealed on the ground that he was denied counsel of his choice. His direct appeal has been consolidated with his appeal from the denial of his motion to vacate sentence, alleging ineffective assistance of counsel, under D.C. Code 1973, § 23-110.

On June 3, 1976, after trial commenced and as the jury was about to be selected, attorney Meyer Koonin attempted to enter an appearance on behalf of appellant. Mr. Koonin admitted that he had been approached by appellant's mother only that morning and that he had never met appellant. He requested a continuance to familiarize himself with the case. Appellant was already being represented by his court-appointed attorney, Mr. Timberlake, his third attorney to date.[5] The trial court denied the request for a continuance.

Mr. Timberlake continued as lead counsel. Mr. Koonin was allowed to enter an appearance and confer with Timberlake; however, he was prohibited from examining

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[1] D.C. Code 1973, § 22-3202.

[2] *Id.*, § 22-2401.

[3] *Id.*, § 22-1801.

[4] *Id.*, § 22-2901.

[5] Appellant's first court-appointed attorney Kubinski had to withdraw on March 11, 1976 because he witnessed a dispute between two potential government witnesses, and the court then appointed Mr. Timberlake. Appellant's mother attempted to hire private counsel, Mr. Parker, to represent her son; however, Mr. Parker withdrew his motion to enter an appearance on June 1, 1976.

witnesses or jurors or making motions. The trial judge explained these restrictions to Koonin by pointing out his total unfamiliarity with the case and his resulting inability to cross examine witnesses. After the midday recess, Koonin withdrew. The next morning, appellant told the court he wished to have Koonin as his counsel. The court explained that Mr. Koonin had not been banished by the court, but rather, had chosen to withdraw.

Appellant's first argument is that the court was required to conduct an inquiry into the effectiveness of his appointed counsel because appellant's attempts to secure additional, private counsel should have alerted the court to appellant's dissatisfaction with his appointed counsel. To be sure, "[w]hen a defendant makes a pretrial challenge to the effectiveness of counsel . . . and requests the appointment of new counsel . . . the trial court has a constitutional duty to conduct an inquiry sufficient to determine the truth and scope of the defendant's allegations." *Monroe v. United States,* D.C. App., 389 A.2d 811, 820, *cert. denied,* 439 U.S. 1006, 99 S. Ct. 621, 5 L. Ed. 2d 683 (1978). *Accord, Farrell v. United States,* D.C. App., 391 A.2d 755 (1978). Here, however, defendant failed to trigger the inquiry mandated by *Monroe* and *Farrell* because he never expressed dissatisfaction with Mr. Timberlake. Some inadequacy must be alleged, either by the defendant or by defendant's attorney himself, before the court is obliged to question the attorney's effectiveness. *See Pierce v. United States,* D.C. App., 402 A.2d 1237 (1979) (when existing counsel requests appointment of co-counsel to help try capital case because of his own perceived inexperience, court must inquire into effectiveness). As we noted in *Monroe v. United States, supra,* defendants' eve-of-trial motions for continuance in order to retain

private counsel will not necessitate effectiveness hearings when defendants "fail[ ] to articulate any substantial basis for dissatisfaction with their attorneys . . . ." *Id.* at 821 n.6.

Turning to appellant's direct appeal, we conclude that the trial court did not err in denying a continuance to allow Koonin to prepare for trial. The request for a continuance was clearly too late under Super. Ct. Cr. R. 111(c), which states: "Except in extraordinary or unforeseen circumstances, no continuances shall be granted in any case unless requested at least two days before the scheduled date of trial." The court had previously granted a continuance when Timberlake was appointed in place of attorney Kubinski. The government's many witnesses had been called. Thus, the trial judge did not abuse her broad authority to move forward with the trial. *See Gressette v. United States,* D.C. App., 256 A.2d 418 (1969) (motion for continuance in order to substitute private attorney for appointed attorney made on day of trial was too late); *United States v. Gragan,* 499 F.2d 1376, 1379 (4th Cir. 1974) ("the Constitution does not afford an accused . . . the 'unbridled right' to insist that his trial be held in abeyance while he replaces one competent attorney with another").

Nor did the limitations placed on attorney Koonin violate appellant's Sixth Amendment right to counsel of his choice. At all times throughout the trial, appellant had the effective assistance of attorney Timberlake. The right to a particular attorney is not absolute. *Harling v. United States,* D.C. App., 382 A.2d 845, 846-47 (1978). It can be qualified by, for example, the court's need to function in an orderly manner, *e.g., United States v. Bragan, supra; United States v. Cozzi,* 354 F.2d 637, 639 (7th Cir. 1965), *cert. denied,* 383 U.S. 911, 86 S. Ct.

896, 15 L. Ed. 2d 666 (1966), the court's right to exclude laypersons from practicing law before it, *United States v. Wilhelm*, 570 F.2d 461 (3d Cir. 1978); *see also Harrison v. United States*, 128 U.S. App. D.C. 245, 254, 387 F.2d 203, 212, *rev'd on other grounds*, 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047 (1967), or, as in this case, the court's obligation to protect defendants from their chosen attorney's violation of ethical rules designed to protect the defendant. *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978). *See also Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 1717, 64 L. Ed. 2d 333 (1980) (unless the trial court knows or reasonably should know that a conflict of interest exists, the court need not initiate an inquiry); *Glasser v. United States*, 315 U.S. 60, 71, 62 S. Ct. 457, 465, 86 L. Ed. 680 (1942) (trial judge has duty to see the trial is conducted with solicitude for the essential right of the accused to have conflict-free representation).

The court has a responsibility to supervise members of the bar and enforce ethical standards. This vigilance will not only protect litigants from their counsel's ethical violations, but will also enable the court to avoid delays in the smooth functioning of the trial which would be likely to occur if incompetent attorneys are allowed to appear. The ethical rules which the trial judge here perceived to be violated were ABA Code of Professional Responsibility EC 2-30 ("Employment should not be accepted by a lawyer when he is unable to render competent service . . . .") and DR 6-101 ("A lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle . . . (2) Handle a

legal matter without preparation adequate in the circumstances.")[6]

The trial court need not accept the defendant's attempt to waive his right to a counsel who is free of ethical violations.[7] *United States v. Dolan, supra* (upholding trial judge's refusal to accept defendant's waiver of his right to a counsel free of conflict of interest). Normally, the court would hold a hearing to assess the extent of the attorney's ethical violation, the disruption or delay to courtroom procedures caused by unqualified representation, and whether the defendant's attempted waiver is made knowingly and intelligently. *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *United States v. Garcia,* 517 F.2d 272 (5th Cir. 1975). It is apparent, however, that on the facts of this case, the trial judge could reasonably conclude without a formal inquiry that Mr. Koonin would be unable to surmount his violation of the aforementioned ethical precepts, and, thus, the court did not err in restricting Mr. Koonin's courtroom activities.

Affirmed.

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[6]During oral argument, it authoritatively came to the court's attention that it was a matter of common knowledge in the trial court that the counsel in question suffered from a serious physical affliction of a nature substantially incapacitating him for court appointment to trial duty, especially for a trial of this gravity.

[7]The Supreme Court decision in *Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), does not lead to a contrary conclusion. The *Faretta* decision was based on the defendant's independent right to self-representation, not on the absolute right to waive effective assistance of counsel. *Id.* at 819-20 & n.15, 95 S. Ct. at 2533 n.15. "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Singer v. United States,* 380 U.S. 24, 34-35, 85 S. Ct. 783, 789, 13 L. Ed. 2d 630 (1965) (right to trial by jury cannot always be waived).

NEWMAN, Chief Judge, dissenting:

I believe that the court was correct in *United States v. Garcia*, 517 F.2d 272, 277 (5th Cir. 1975), in concluding that "[i]f defendants may dispense with the right to be represented by counsel altogether, . . . it would seem that they may waive the right to have their retained counsel free from conflicts of interest," and presumably from other charges of ineffectiveness, at least where a knowing and intelligent waiver is made. Moreover, I believe that appellant has a right to counsel of his choice and that the restrictions imposed by the trial court on appellant's retained counsel rendered that choice meaningless.

There are several rights involved in this case: the defendant's right to retain and be represented by counsel of his own choice, *Powell v. Alabama*, 287 U.S. 45, 53, 53 S. Ct. 55, 58, 77 L. Ed. 158 (1932); his right to the effective assistance of counsel, *Glasser v. United States*, 315 U.S. 60, 76, 62 S. Ct. 457, 467, 86 L. Ed. 680 (1942); and his right to refuse counsel and to conduct his own defense, provided there is a proper waiver, *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). None of these rights are absolute or "preferred", *see Garcia, supra* at 276; each in some way may either be circumscribed or waived.

The right of a defendant to be represented by retained counsel of his choice has long been recognized as an essential element of the general right to counsel guaranteed by the Sixth Amendment. *Powell v. Alabama, supra* at 53, 53 S. Ct. at 58. A defendant, however, may waive his right to counsel and may conduct his own defense if the trial court is satisfied that the waiver is made knowingly and intelligently, and with an awareness of the possible consequences. *Faretta, supra* at 835, 95

S. Ct. at 2541; *Hsu v. United States*, D.C. App., 392 A.2d 972, 981-87 (1978).

With respect to the guarantee of effective assistance of counsel, the recent Supreme Court decision in *Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S. Ct. 1708, 1717-18, 64 L. Ed. 2d 333 (1980), states that, absent objection by a defendant, "trial courts may assume either that multiple representation entails no conflict or *that the lawyer and his clients knowingly accept such risks* of conflict as may exist." (Footnote omitted; emphasis added.) The Court noted that attorneys "have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." *Id.* at 346, 100 S. Ct. at 1717 (footnote omitted). Nevertheless, the fact that a potential violation of such an ethical duty might exist did not impinge on the Court's recognition that the lawyer and his client might still knowingly risk the consequences of such a conflict. The Fifth Circuit in fact reached the same result in *United States v. Garcia, supra.* While the Court in *Cuyler* dealt only with one specific type of ineffective assistance, *i.e.* the problem of conflicting representation, the same rationale can be applied to the entire array of ineffective assistance problems.

The Court in *Cuyler* implicitly recognized that though a defendant may be entitled to counsel of his choice, even if that counsel is ineffective, the fact that the defendant has waived *his* right will not necessarily release the lawyer from his own obligations under the professional code. If the lawyer does violate those obligations it is not generally within the purview of the court to forestall him—for the court's primary obligation is to ensure that the defendant's constitutional right to counsel of his own choosing be protected, at least where

it is a choice knowingly and intelligently made. Rather, it is for the appropriate Bar committee to decide whether a lawyer has violated his professional obligation and to take the requisite disciplinary actions. *See* D.C. App. R. XI, § 4(3).

I base my conclusion that the defendant's right to counsel of his own choosing may be allowed to predominate over his right to effective assistance on the confluence of several principles. As was enunciated in *Faretta, supra* at 821, 95 S. Ct. at 2534, "[u]nless the accused has acquiesced in such representation [by certain chosen or appointed counsel], the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." (Emphasis in original.) Directly related is the right of the defendant to structure and direct his defense as he himself chooses. *See id.* at 819-20, 95 S. Ct. at 2533. In so doing, the defendant may go so far as to choose to represent himself, though "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.* at 834, 95 S. Ct. at 2540. As Mr. Justice Sutherland stated in *Powell v. Alabama, supra* at 69, 53 S. Ct. at 64, *quoted in Faretta, supra* at 833 n.43, 95 S. Ct. at 2540 n.43:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or inadmissible. He lacks both the skill and knowledge adequately to prepare his defense,

> even though he have [*sic*] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Obviously, an experienced and skilled practitioner of the law, even though totally unfamiliar with the facts of a given case, will in all likelihood be able to provide far more competent assistance than a defendant would otherwise receive by virtue of his own untutored labors. Particularly with respect to questions of evidentiary admissibility, the propriety of the prosecution's opening and closing statements, the types and manner of questions to be asked of witnesses on cross-examination, and the requesting of proper jury instructions, the guiding hand of such counsel should prove to be far more effective than the defendant's own unaided efforts. Since a defendant may constitutionally elect to rely solely upon his own inadequate legal skills in defending himself, there is no reason why he may not elect to retain counsel whose skills—notwithstanding charges of ineffectiveness—are likely to be superior to his own.

In the present case, the defendant was not simply waiving his right to effective assistance of counsel, and thereby attempting to compel the opposite, as the majority suggests in note 7, *supra*, citing *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965). Rather, he is waiving one constitutional prerogative while at the same time attempting to fully exercise another, *i.e.*, the right to counsel of his own choice. Where defendant has chosen to exercise one constitu-

tional guarantee over another and has done so knowingly nad intelligently, and where neither of the two rights is a "preferred" right, I would conclude that it is reversible error for the court to refuse to honor his decision. *See Garcia, supra*; *United States v. Bubar*, 567 F.2d 192, 202-04, 203 n.18 (2d Cir.), *cert. denied*, 434 U.S. 872, 98 S. Ct. 217, 54 L. Ed. 2d 151 (1977).

The majority relies heavily on *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978), where the defendant sought reversal of his conviction on the grounds of ineffective assistance of counsel due to a conflict of interest resulting from his attorney's representation of both the defendant and his codefendant. While the court upheld the trial judge's refusal to accept the defendant's waiver of his right to counsel free of conflict of interest, it is clear that the court recognized that a waiver *was* possible when made "knowingly, intelligently, and with awareness of the likely consequences of the waiver." *Id.* at 1181. The court also recognized that *absent* such a waiver, the attorney would run the risk of violating his ethical obligations:

> When cases arise in which the judge finds it impossible to elicit and accept a knowing and intelligent waiver from the defendant, it is the obligation of the attorney concerned, as an officer of the court and subject to its supervisory powers, to withdraw from the case.
>
> * * *
>
> Besides breach of the lawyers' ethical code, there are public interests which impel an attorney's withdrawal from representing multiple defendants *absent a knowing and intelligent waiver.* [*Id.* at 1182 (emphasis added).]

Within the factual confines of that case the court determined that Dolan's waiver was insufficient. However,

the court also acknowledged that its previous decision in *United States ex rel. Hart v. Davenport*, 478 F.2d 203 (3d Cir. 1973), "still remains the test on direct appeal or collateral attack for determining the validity of a waiver of the effective assistance of counsel in those situations in which waiver would be proper." *Dolan, supra* at 1184 n.12.

Thus, it is clear that the right to retain counsel of one's choice is central to the Sixth Amendment, and, in some circumstances, that right may predominate over the right to effective assistance. In the present case, however, the restrictions imposed by the trial court on appellant's retained counsel rendered appellant's choice meaningless. The court, for example, prohibited, retained counsel from examining jurors or witnesses, from conducting cross-examination, and from making motions or raising objections. Rather, it merely allowed counsel to enter an appearance and to confer with court-appointed counsel.[1]

I believe what Mr. Justice Frankfurter wrote in *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280, 63 S. Ct. 236, 242, 87 L. Ed. 268 (1942), ruling that a

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[1]The majority's reliance on *Gressette v. United States*, D.C. App., 256 A.2d 428 (1969), and *United States v. Bragan*, 499 F.2d 1376, 1379 (4th Cir. 1974), is unpersuasive in the instant case since a suspension of the trial was not necessary to effectuate appellant's choice of counsel.

The majority suggests in note 6, *supra*, that it was "common knowledge" that counsel in question suffered from a serious physical affliction, which substantially incapacitated him for trial work. The record below, however, fails to reflect this fact and fails to reflect whether the trial court based its ruling on this matter at all. Moreover, I suggest that it was the severe restrictions imposed by the trial court itself that truly crippled retained counsel.

pro se defendant may waive his right to jury trial without assistance of counsel, is equally pertient to the present question:

> When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . ., and to base such denial on an arbitrary rule that a man cannot choose to conduct his defense before a judge rather than a jury unless, against his will, he has a lawyer to advise him, although he reasonably deems himself the best advisor for his own needs, is to imprison a man in his privileges and call it the Constitution.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11209 and No. 79-348

[Filed: June 24, 1981]

REGINALD A. LEWIS,
a/k/a Maurice Contee,
Appellant,

v. **81173-75**

UNITED STATES,
Appellee.

BEFORE: *Newman, Chief Judge; *Kelly, Nebeker, Harris, Mack, Ferren, and Pryor, Associate Judges; and *Gallagher, Associate Judge, Retired.

ORDER

On consideration of appellant's petition for rehearing and suggestion for rehearing en banc, it is

ORDERED by the merits division that appellant's petition for rehearing is denied; it appearing that the majority of the judges of this Court has voted to deny appellant's petition for rehearing en banc, it is

---

*denotes merits division

FURTHER ORDERED that appellant's aforesaid petition for rehearing en banc is denied.

PER CURIAM

Copies to: Clerk, Superior Court

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Chief Judge Newman would grant appellant's petition for rehearing; Chief Judge Newman and Associate Judges Mack and Ferren would grant appellant's petition for rehearing en banc.

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

RULE X

RULES OF PROFESSIONAL CONDUCT

The American Bar Association's Code of Professional Responsibility, as amended by the Court (See Appendix A for amendments to date), shall provide the standards governing the practice of law in the District of Columbia. Amendments thereto adopted by the American Bar Bassociation shall be deemed incorporated therein as of the ABA's effective date unless the Court, sua sponte, defers the effectiveness of any such amendment, or unless the Bar, or any voluntary bar association, within 90 days prior to the ABA's effective date petitions the Court to reject or modify said amendment.

DISTRICT OF COLUMBIA COURT OF APPEALS

RULE XI

* * *

Section 4 – The Board on Professional Responsibility

(1) The Court shall appoint a board to be known as the "Board on Professional Responsibility" (hereinafter referred to as the Board) which shall consist of seven members of the Bar of the District of Columbia and two members who are not lawyers. The attorney members shall be appointed from a list submitted by the Bar containing the names of not fewer than three active members of the Bar for each attorney vacancy to be filled. The non-lawyer members shall be selected by the Court. In appoint-

ing non-lawyer members, the Court shall consider, but not be limited to, nominees whose names are submitted to the Court in writing by the Bar or by any other organization (voluntary bar or otherwise) or individual. One of the attorney members shall be designated by the Court as Chairman of the Board and another as Vice-Chairman to act in the absence or disability of the Chairman.

(2) When the first two non-lawyer members are selected, one shall be appointed for a term of two years, and the other shall be appointed for a term of three years. Thereafter, as already has come to be the case with respect to those members of the Board who are members of the Bar, all regular terms shall be for three years. Upon the completion of a regular term, a member shall continue to serve until a successor is appointed. The Board shall act only with a concurrence of a majority of its members present and voting; provided, however, that six members of the Board shall constitute a quorum for adjudicative matters and five members shall constitute a quorum for administrative matters. The Board shall act only with a concurrence of a majority of its members present and voting except that in adjudicative matters the Board shall act only with a concurrence of a majority of its entire membership.

(3) The Board shall have the power and duty:

(a) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effect the purposes of these disciplinary rules.

(b) To appoint Bar Counsel and such Assistant Bar Counsel and staff as may from time to time be

required properly to perform its functions hereinafter prescribed and fix their compensation. (Bar Counsel and Assistant Bar Counsel hereinafter are referred to collectively as Bar Counsel.)

(c) To appoint two or more hearing committees, each committee consisting of three members, of whom at least two must be members of the Bar of the District of Columbia, to conduct hearings into formal charges of misconduct, and to submit their findings and recommendations, together with the record, to the Board.

(d) To assign, through its Chairman, periodically and on a rotating basis, an attorney member of each hearing committee to review and approve or modify recommendations by Bar Counsel for dismissals, informal admonitions, and the institution of formal charges.

(e) To review, upon application by Bar Counsel, a determination by a hearing committee that a matter should be concluded by dismissal or by informal admonition without the institution of formal charges.

(f) To assign, through its chairman, formal charges to a hearing committee.

(g) To review the findings and recommendations of hearing committees with respect to formal charges and to prepare and forward its own findings and recommendations, together with the record of the proceeding before the hearing committee and the Board, to this court.

(h) To reprimand attorneys subject to the jurisdiction of this court for misconduct.

(i) To adopt rules of procedure not inconsistent with the rules promulgated by this court.

(j) Notwithstanding the provisions of paragraph (3)(b) of this section, the Board of Governors may adopt or reject a proposed budget of the Board on Professional Responsibility, but in the event of a dispute between the Board of Governors and the Board on Professional Responsibility as to the amount of the latter's proposed budget, or any of its budget items, the Court shall resolve such dispute upon application by either Board.

(k) To assist the Court in its duty to oversee the functioning of the Board, the Court in its discretion may request that it be provided for informational purposes with the file in any case which has been disposed of by dismissal, informal admonition, or reprimand.

The Board on Professional Responsibility shall, to the extent it deems feasible, consult with officers of the Bar and of voluntary bar associations in the District of Columbia concerning any appointments which it is authorized to make.

ABA CODE OF PROFESSIONAL RESPONSIBILITY

ETHICAL CONSIDERATION 2-30

EC 2-30 Employment should not be accepted by a lawyer when he is unable to render competent service or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another. Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment.

DISCIPLINARY RULE 6-101

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

CANON 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

Opposition

Office - Supreme Court, U.S.
FILED
NOV 9 1981
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No. 81-352

In the Supreme Court of the United States

OCTOBER TERM, 1981

REGINALD LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
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QUESTION PRESENTED

Whether the trial court impermissibly deprived petitioner of the assistance of counsel of his choice by limiting the role at trial of an attorney who entered an appearance on the morning of trial (at which petitioner already was represented by fully prepared court-appointed counsel) because that attorney had not met or conferred with petitioner and was unfamiliar with the facts of the case.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-352

REGINALD LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unofficially reported at 430 A.2d 528.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1981, and a petition for rehearing was denied on June 24, 1981 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on August 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

After a jury trial in the Superior Court of the District of Columbia, petitioner was convicted on various counts of first degree murder, robbery, and burglary, in violation of D.C. Code §§ 22-1801, 2401, 2901, and 3202 (1973). He was sentenced to consecutive terms totaling 140 years' imprisonment. In a combined appeal from his conviction and from a denial of a motion to vacate his sentence, the court of appeals affirmed, one judge dissenting (Pet. App. 1a-13a).

1. The evidence at trial, the sufficiency of which is not challenged, showed that on July 30, 1975, petitioner and co-defendant Arthur Byrd bound, gagged, and murdered one Mary Brown and three other persons in Brown's apartment in the District of Columbia. All of the victims died from gunshot wounds to the head. Tr. 311, 315, 350, 353. The evidence further established that Brown, a friend of Byrd, had, while in Byrd's company, withdrawn $1,000 from the bank earlier that day. Tr. 438-440, 457, 476, 479-481. Later that afternoon, petitioner and Byrd purchased $672 worth of clothing, paying for their purchases in cash. Tr. 749-751. A necklace and a valuable gold coin, later identified as Brown's, were found among petitioner's possessions during a court-authorized search of his home. Tr 582, 586, 651, 699-700, 757, 769. Also found was a box of bullets—the same caliber as used in the murder—purchased by Brown several months earlier. Chemical analysis showed that the bullets were metallurgically identical to those recovered from the victims' bodies. Tr. 584, 601-607, 741-743. In addition, petitioner's fingerprint was found on a stereo speaker in Brown's apartment. Tr. 405-409.

2. An attorney was appointed to represent petitioner on August 6, 1975, the day after petitioner's arrest. On March 11, 1976, six days before the scheduled trial date, the attorneys for both petitioner and his co-defendant withdrew their appearances after observing a disagreement between two potential government witnesses that might have required the attorneys themselves to be witnesses at the trial. Pet. App. 2a n.5. The court then appointed Frederick C. Timberlake to represent petitioner and rescheduled the trial date for June 1, 1976.

On May 24, 1976, three other attorneys retained by petitioner's family filed a motion to enter their appearances on petitioner's behalf and requested a continuance. On June 1, 1976, the date on which the trial was scheduled to commence, one of the attorneys, Darrel S. Parker, announced that after further investigation and discussions with the prosecutor and petitioner's mother, all three lawyers wished to withdraw their motion to enter an appearance and their request for a continuance. After ascertaining that Timberlake was ready for trial, the court informed petitioner that the proceedings would continue as scheduled (Tr. II 3-6; Pet. App. 2a n.5).[1] Motions were heard later that day and through the next day, June 2, 1976. Tr. 15-198.

Following completion of the hearings on pretrial motions, the trial itself was due to commence on June 3, 1976. On that morning, as the jury was about to be selected, yet another attorney, Meyer Koonin, sought to enter his appearance as counsel for petitioner. Koonin had been retained by petitioner's

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[1] "Tr. II" refers to the transcript of the June 1, 1976, proceedings concerning Parker's motion to withdraw his previously filed motion to enter his appearance.

mother pursuant to a telephone conversation earlier that morning. Koonin immediately asked for a continuance to acquaint himself with the facts of the case. Tr. 200. The court refused to grant a continuance, the request being untimely under a local rule requiring a motion for a continuance to be filed at least two days before trial except in "extraordinary or unforeseen circumstances." Super. Ct. Crim. R. 111(c); see Pet. App. 4a; Tr. 210. However, the court did permit Koonin to appear on behalf of petitioner, although it ruled that Timberlake would remain as lead counsel. The court explained that Koonin could confer both with Timberlake and petitioner, but would not be permitted to approach the bench or question any witnesses. The court required this arrangement because Koonin was unfamiliar with the case and had not even met or consulted with petitioner, while Timberlake had had an opportunity to consult with petitioner, have discovery, prepare for trial, and present all pretrial motions. Tr. 203-204. Koonin then entered his appearance and remained through the voir dire and jury selection. Immediately after the luncheon recess, however, Koonin filed a motion to withdraw his appearance, which the court granted. Tr. 211-212. The trial then proceeded.

The next morning, before the trial resumed, petitioner informed the court that he wished to have Koonin represent him. The court responded that it had permitted Koonin to enter the case to assist Timberlake in representing petitioner, but that Koonin had withdrawn his appearance. When the court asked petitioner whether he had heard Koonin make that motion, petitioner admitted that he "wasn't paying too much attention" (Tr. 337).

3. The District of Columbia Court of Appeals affirmed petitioner's conviction and the trial court's denial of petitioner's motion to vacate sentence, in which petitioner had contended that Timberlake rendered ineffective assistance. The court concluded that the trial court did not abuse its discretion in denying Koonin's request for a continuance. The court further found that the limitations placed on Koonin's participation did not violate petitioner's asserted Sixth Amendment right to counsel of his choice. The court reasoned that a defendant's right to a particular lawyer is not absolute and that it can be qualified by the court's need to function in an orderly manner or to prevent ethical violations that would injure the defendant. Pet. App. 4a-5a. Here, the court of appeals found the trial court's action to have been proper in view of Koonin's lack of preparation for trial. *Id.* at 5a-6a. The court observed as well that it had come out during oral argument that Koonin suffered from a physical affliction that substantially incapacitated him for trial duty, especially in a case of this gravity. *Id.* at 6a n.6.

ARGUMENT

1. Although petitioner suggests (Pet. 5-8) that he sought other counsel because his court-appointed attorney, Timberlake, was ineffective, the trial court rejected petitioner's claim of ineffective assistance of counsel after a post-trial hearing on that claim, raised in a motion to vacate sentence. The court of appeals affirmed the trial court's denial of relief on this ground, concluding that petitioner received effective assistance from Timberlake at all times throughout the trial. Pet. App. 3a-4a. Petitioner has not sought this Court's review of his ineffective assistance

of counsel claim.[2] For present purposes, then, it must be taken as established that Timberlake rendered effective assistance.

2. Petitioner nevertheless contends (Pet. 9-15) that the trial court impermissibly denied him the right to be represented by retained counsel of his own choosing and forced him to proceed with Timberlake. This claim is without merit.

Although a defendant's right to counsel is absolute, it is well-settled that a defendant does not have an absolute right to particular counsel. *United States* v. *Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978); *United States* v. *Poulack*, 556 F.2d 83, 86 (1st Cir.), cert. denied, 434 U.S. 986 (1977); *United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976); *United States* v. *Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976), cert. denied, 429 U.S. 1104 (1977) (remanded by 424 U.S. 600 (1976)); *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir), cert. denied, 409 U.S. 980 (1972); *United States ex rel. Carey* v. *Rundle*, 409 F.2d 1210 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970). A defendant need only be given "an initial, fair and reasonable opportunity to select counsel." *United States* v. *Burton*, *supra*, 584 F.2d at 499; see also *Ungar* v. *Sarafite*, 376 U.S. 575, 590 (1964). And the determination whether a defendant's selection of counsel of his choice was impermissibly abridged depends upon the particular circumstances of the case. *United States* v. *Burton*, *supra*, 584 F.2d at 490.

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[2] The thorough opinion of the Superior Court on petitioner's motion to vacate sentence addresses and rejects all of the points on which petitioner now relies in suggesting that Timberlake's performance was inadequate. We rely on that opinion, which we have included as an appendix to this brief, *infra*, to the extent that Timberlake's performance is of any relevance to the issues presented for review.

The course of petitioner's dealings with various counsel strongly suggests that, in reality, he cared little who represented him. Although petitioner had ample opportunity between his August 1975 arrest and his trial in June 1976 to select an attorney, he did not retain private counsel—in addition to his court-appointed attorney, Timberlake—until late May 1976. When, a week later, those attorneys withdrew their motion to enter an appearance and request for a continuance, petitioner did not inform the court that he was concerned about Timberlake's effectiveness. The proceedings then commenced on June 1 with Timberlake as petitioner's lawyer.

Although petitioner now claims that he wanted Koonin to be his attorney, Koonin did not enter an appearance until two days later on June 3, just as the jury was to be selected, and petitioner had not even met or spoken with Koonin at that time. Tr. 336-337; May 16, 1978 Tr. 12. Moreover, while Koonin was in the case, neither petitioner nor Koonin on his behalf expressed dissatisfaction with Timberlake or urged that he be relieved of his duties;[3] nor did petitioner personally state that he wanted Koonin to participate more fully. Finally, when Koonin announced his intention to withdraw, petitioner did not inform the court that he wanted Koonin to remain. In these circumstances, petitioner must be taken to have foregone his opportunity to make a timely claim that Koonin was the attorney of his choice and that he wanted Koonin, rather than Timberlake, to be his

[3] Thus, petitioner's claim (Pet. 17) that the trial court was aware of his alleged dissatisfaction with Timberlake but nonetheless forced Timberlake upon him is baseless. Indeed, the court of appeals specifically found that petitioner never expressed dissatisfaction with Timberlake (Pet. App. 3a), a finding amply supported by the record.

lead if not sole counsel. Accordingly, petitioner may not now complain that his unexpressed choice was not respected. Cf. *United States* v. *Bennett*, 539 F.2d 45, 50-51 (10th Cir.), cert. denied, 429 U.S. 925 (1976); *United States ex rel. Soto* v. *United States*, 504 F.2d 1339, 1344 (3d Cir. 1974).

3. Even putting to one side petitioner's failure to assert in a timely fashion his alleged desire to be represented by counsel of his choice, the district court's actions in the circumstances of this case were wholly proper. As an initial matter, petitioner makes clear (Pet. 17 n.3) that his argument in the court of appeals was not based on the trial court's denial of Koonin's motion for a continuance to allow him to become acquainted with the case, and petitioner does not argue in his petition in this Court that the trial court erred in this regard. Accordingly, it can be taken as established for present purposes that the trial court properly declined to grant the requested continuance.[4] Petitioner states, however, that "[a]fter the continuance was denied Koonin asserted he was prepared to proceed to trial" (Pet. 17 n.3), and he argues that the trial court should have per-

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[4] As explained above (see page 4, *supra*), that motion was untimely under local rules. In any event, as the court of appeals held (Pet. App. 4a), the trial court did not abuse its discretion by refusing to grant another continuance just as the jury was about to be selected, in order to bring yet another attorney into the case, particularly in view of the availability of appointed counsel who was fully prepared to proceed. See *United States* v. *Altamirano*, 633 F.2d 147, 152 (9th Cir. 1980), cert. denied, No. 80-6168 (Oct. 5, 1981); *United States* v. *Davis*, 604 F.2d 474, 480-481 (7th Cir. 1979); *United States* v. *Williams*, 594 F.2d 1258, 1261 (9th Cir. 1979); *United States* v. *Gates*, 557 F.2d 1086, 1088 (5th Cir. 1977); *Maynard* v. *Meachum*, 545 F.2d 273, 278-279 (1st Cir. 1976).

mitted Koonin to do so and to assume full responsibility for the defense despite his lack of familiarity with the case.

Contrary to petitioner's assertion, however, Koonin—who had never met or conferred with petitioner and had informed the court that he was not acquainted with the facts of the case—cannot be thought to have been "prepared" to proceed immediately to trial within any professionally acceptable meaning of the quoted word. Nor did Koonin so inform the court. Rather, after the motion for a continuance was denied and the court inquired whether Koonin still wished to enter an appearance, Koonin simply stated that he did. Tr. 203.

The court allowed Koonin to enter an appearance, but it declined to permit him to examine witnesses, explaining (Tr. 204):

> How can you propose to examine a witness when you have indicated that you know nothing about the case? The case would be reversed * * * by the Court of Appeals for letting an attorney who knows nothing about the case to come in and try to effectively cross examine anyone.

The court nevertheless allowed Koonin to enter an appearance and to consult with petitioner and Timberlake about the conduct of the trial. In the circumstances then confronting the trial court, the limitations placed on Koonin's role resulted in a reasonable accommodation of petitioner's apparent interest in receiving the assistance of Koonin in addition to that of Timberlake[5] and the court's and the

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[5] As noted above, neither Koonin nor petitioner urged that Timberlake should be discharged from the trial. After the motion for a continuance was denied, Koonin sought only to participate freely in the conduct of the trial.

public's interest in ensuring the orderly conduct of the jury trial that was about to commence. See *United States* v. *Dinitz*, 424 U.S. 600 (1976); *United States* v. *Weninger*, 624 F.2d 163, 166-167 (10th Cir.), cert. denied, 449 U.S. 1012 (1980); *United States ex rel. King* v. *Schubin*, 522 F.2d 527 (2d Cir.), cert. denied, 423 U.S. 990 (1975); cf. *Geders* v. *United States*, 425 U.S. 80, 86 (1976).

Petitioner argues (Pet. 10-11), however, that because, under *Faretta* v. *California*, 422 U.S. 806 (1975), a defendant may waive his Sixth Amendment right to the assistance of counsel and represent himself, he has a similar right to waive the *effective* assistance of counsel and insist on being represented by an attorney who is unprepared for trial. But even if petitioner were correct that a defendant generally has a right to insist on being represented by an attorney who concededly is not prepared to render effective assistance (but see pages 11-13, *infra*), the trial court was not obliged to accede to petitioner's belated assertion of that right here. In *Faretta*, the defendant had requested "[w]ell before the date of trial" that he be permitted to represent himself (422 U.S. at 807). *Faretta* therefore does not suggest that a defendant who says nothing about his representation by a particular lawyer until the trial is already under way is entitled to proceed pro se or to be represented by another attorney. See *United States* v. *Lawrence*, 605 F.2d 1321, 1324 (4th Cir. 1979), cert. denied, 444 U.S. 1084 (1980); *United States* v. *Dunlap*, 577 F.2d 867, 869 (4th Cir), cert. denied, 439 U.S. 858 (1978); *Sapienza* v. *Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976).[6]

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[6] In contrast, in *United States* v. *Bubar*, 567 F.2d 192 (2d Cir.), cert. denied, 434 U.S. 872 (1977), upon which

In any event, petitioner errs in suggesting that *Faretta* v. *California* establishes a right to be represented by counsel who concededly is not prepared to render effective assistance. The decision in *Faretta* was not premised on the existence of a *right* to waive the assistance of counsel altogether, from which a court might infer a "lesser included" right to waive the effective assistance of counsel. To the contrary, the Court stressed in *Faretta* that a right of self-representation could *not* be inferred mechanically from the defendant's *ability* to waive his right to the assistance of counsel (422 U.S. at 820 n.15); as the Court there observed, " '[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.' " *Id.* at 819 n.15, quoting *Singer* v. *United States*, 380 U.S. 24, 34-35 (1965).[7]

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petitioner relies (Pet. 11-12), the attorney with whom the defendant chose to remain had been involved in the case well before trial, along with another attorney who was later permitted to withdraw. 567 F.2d at 203. See also *United States* v. *Cox*, 580 F.2d 317, 319 (8th Cir. 1978), cert. denied, 439 U.S. 1075 (1979), and *United States* v. *Lespier*, 558 F.2d 624, 628 (1st Cir. 1977), upon which petitioner also relies (Pet. 12). Petitioner's reliance (Pet. 9-10) on *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), is equally misplaced. In *Cuyler*, the Court held that absent some reason to believe that a conflict of interest exists, a trial judge has no obligation to inquire into the propriety of multiple representation unless the defendant or his attorney raises an objection. That decision therefore cuts against petitioner's claim that the trial court was obliged to remove Timberlake and permit Koonin's substitution as lead counsel, because here neither petitioner nor Koonin had informed the court of any concern about Timberlake's performance.

[7] Thus, the cases cited by petitioner (Pet. 12, 16-17) that discuss when a defendant may be held to have waived his

Rather, the right recognized in *Faretta* to appear personally is an independent right guaranteed by the Sixth Amendment, which generally confers on the defendant, not his attorney, the right to make a defense. 422 U.S. at 819; *United States* v. *Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978). One of the means available to a defendant in making his defense is the assistance of counsel. But when a defendant chooses to be represented by counsel, he necessarily does so subject to reasonable standards governing the qualifications and conduct of counsel (*United States* v. *Dinitz*, *supra*), including ethical standards necessary to preserve the fairness and integrity of the administration of justice and the role of counsel in the criminal justice system.

For example, it scarcely could be contended that a defendant has an absolute constitutional right to be represented by a lay person, a disbarred lawyer, or even a lawyer licensed in another jurisdiction. Cf., *Leis* v. *Flynt*, 439 U.S. 438 (1979). So, too, we believe that a defendant does not have a constitutional right to have his defense presented by an attorney with whom he has not even conferred and who does not have any familiarity with the facts of the case. Such an arrangement, under which counsel's performance almost inevitably would be ineffective, cannot be thought to provide for the meaningful "assistance of counsel" that the Sixth Amendment was intended to guarantee. Here, moreover, the trial court *did* provide for petitioner to receive the assis-

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right to counsel (see *United States* v. *Lespier*, *supra*; *Maynard* v. *Meachum*, 545 F.2d 273, 278 (1st Cir. 1976)), do not support his assertion of a constitutional right to insist on ineffective counsel. *Cuyler* v. *Sullivan*, *supra* (see Pet. 9, 11), is inapposite for similar reasons.

tance of Koonin, who was permitted to consult with both petitioner and Timberlake during the trial. The court simply required that primary responsibility for presenting the defense remain with Timberlake, who was prepared to assume that responsibility. Thus, whatever might be the balance that should be struck in other contexts between the interest of an accused in being represented by an attorney he has selected and the trial court's obligation to supervise the trial and the conduct of attorneys appearing before it, there is no merit to petitioner's contention here that the courts below impermissibly deprived him of counsel of his choice.[8]

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[8] Petitioner concedes that "a lawyer sought by a defendant shortly before trial may be confronted with an ethical decision not to take the case because of lack of familiarity" (Pet. 18). But petitioner has not offered any reason why a court must nevertheless permit a lawyer to represent a defendant in such circumstances, where the conduct plainly would violate ethical rules (designed to protect clients generally and the integrity of the bar and the judicial process) that prohibit a member of the bar from accepting employment when he is unable or unprepared to render competent service. See ABA Code of Professional Responsibility, DR 6-101. The lawyer of choice for a defendant may be unavailable for a variety of reasons—he may be too busy, charge too much, have a conflict of interest, or otherwise be indisposed. None of these situations can be thought to deprive a defendant of his Sixth Amendment right to counsel of his choice. No reason appears why a Sixth Amendment violation occurs merely because it is the rules of the profession (as applied by the courts in the conduct of a criminal trial), rather than the attorney's own self-restraint or other factors, that render the attorney unavailable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1981

APPENDIX

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

Criminal No. 81173-75

UNITED STATES OF AMERICA

v.

REGINALD LEWIS

OPINION AND ORDER

This matter is before the Court on defendant's motion to vacate sentence pursuant to D.C. Code 23-110 (1973 Ed.). After trial by jury, defendant and co-defendant, Arthur Byrd, were convicted of four counts of first degree murder, four counts of felony murder, two counts of armed robbery, and one count of burglary. Defendant was thereafter sentenced. He now moves this Court to vacate the sentence on the ground of ineffective assistance of counsel. A full hearing was held on the motion, after which the matter was taken under advisement. Defendant was represented by new counsel at the hearing.

Mr. Lewis raises several points in support of his claim of ineffective assistance of his trial counsel, Mr. Frederick Timberlake. It is argued that counsel spent inadequate time in consultation with Mr. Lewis concerning his defense including motions related thereto. Defendant also contends that counsel advised him not to testify; that defendant was under the assumption that counsel would call defendant's mother to testify regarding a red-beaded necklace and defendant's presence at his place of employment

the entire morning on the day the crimes allegedly were committed. Finally, defendant charges that trial counsel failed to conduct a thorough investigation of the case, to call necessary witnesses, and to develop his alibi defense. Several other points are urged upon the Court and will be later discussed.

Before proceeding to the evidence developed at the hearing, a discussion of the criteria by which defendant's claim must be evaluated is in order. To successfully demonstrate ineffective assistance of counsel, post-trial, defendant must show gross incompetence of counsel such that he was deprived of a substantial defense; i.e., that the gross incompetence of counsel in effect blotted out the essence of a substantial defense. *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967); *Angarano* v. *United States*, 312 A.2d 295 (D.C.C.A. 1973); *White* v. *United States*, 358 A.2d 645 (D.C.C.A. 1976). "Moreover a substantial defense lost due to incompetence must be shown to be a defense as a matter of law and available from facts known or obvious to the trial attorney. Mere errors of judgment as disclosed by subsequent events or hindsight are not sufficient to establish ineffective assistance." *Woody* v. *United States*, 396 A.2d 592, at 594 (D.C.C.A. 1977). See also *Johnson* v. *United States*, 364 A.2d 1198 (D.C.C.A. 1976); *Towler* v. *United States*, 271 A.2d 553 (D.C.C.A. 1970).[1]

At the hearing, Mr. Lewis testified that he and Mr. Timberlake met on only two occasions to discuss the case prior to trial. The first meeting was of approximately 45 minutes to one hour duration; the second for 20-30 minutes. Defendant stated there

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[1] Defendant relies on *United States* v. *DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973).

were no other discussions of the case, including motions, or of Mr. Lewis' proposed testimony at trial. Further, he testified that two attempts to reach counsel by telephone and two or three letters, all went unanswered. Defendant did not estimate when the calls were made, whether he was able to leave messages, to whom he spoke, or what he was told. Similarly, except that they concerned his case, defendant did not describe the contents of the letter or state when they were mailed.

Mrs. Sophia Lewis, defendant's mother, testified that she never received a call from Mr. Timberlake, nor did counsel interview her. She admitted that she and counsel had had several telephone conversations. In one conversation they discussed her desire to testify that she owned a certain necklace which other witnesses subsequently testified at trial belonged to one of the victims.

Mr. Timberlake recalled one meeting with defendant at Lorton Reformatory of one-and-a-half to two hours duration, and stated that he recalled other meetings, certainly on the date of each court appearance.

Whether the time spent in consultation with a client is adequate depends to a very great extent upon the experience and skill of counsel, the nature of the case, the strength of the Government's case, and a host of other, more subtle, factors. Mr. Timberlake testified that he has been engaged in the practice of law for 17 years. He further testified that his practice has generally emphasized criminal matters and that he handles approximately 200 criminal cases a year—eight or nine of which are homicides. Mr. Timberlake was the second attorney in the case and at the time of his appointment, full discov-

ery had occurred and the case was ready for trial. Previous counsel provided all his notes and other materials concerning the case to Mr. Timberlake. In the Court's view, these facts necessarily impact on its assessment of the adequacy of the time spent in consultation. The Court also notes that the testimony of Mrs. Lewis on this point adds nothing to defendant's allegation. Mr. Timberlake's client was Mr. Lewis. Neither the number of telephone conversations between counsel and Mrs. Lewis, nor her evaluation of counsel's attitude toward her is relevant to the question of whether consultation time was adequate as between attorney and client.

Mr. Lewis also claims there were no discussions with him of defense motions, that counsel failed to submit a written motion to suppress tangible evidence, and that counsel did not review Mr. Lewis' proposed testimony. At trial, Mr. Timberlake advised the Court that it had been his understanding from previous counsel for defendant that a written motion to suppress had been filed earlier. Counsel did not, as defendant asserts, concede the motion. Mr. Lewis' co-defendant had moved for the same relief and competently argued in support thereof; Mr. Timberlake joined the motion. No gross ineptitude is demonstrated by the fact that he did so, given the circumstances of the case.

Defendant also charges trial counsel with failure to argue effectively in support of the motion for severance of his case from that of his co-defendant, against whom the evidence was "much stronger." (Motion at 2, 4). The Government in its opposition correctly points out that overwhelming circumstantial evidence placed Mr. Lewis and co-defendant together on the day the homicides were committed.

Mr. Lewis earned $2.45 per hour at his employment, yet on the day in question, defendants spent a large amount of cash on new clothes. Byrd was later identified as the man who accompanied one of the victims to the bank where she withdrew a large amount of cash shortly before her death. This evidence, *inter alia*, resulted in a denial of the motion to sever. The denial of the motion does not prove ineffectiveness of counsel.

Mr. Lewis' contention that trial counsel failed to timely object to the admission in evidence of the necklace and gold coin lacks merit. In fact, Mr. Timberlake objected to admission of this and 33 other pieces of evidence. The necklace and coin were nevertheless admitted over his objections. Whether a proper foundation had been laid for receipt in evidence of these or any other evidentiary items, was entirely a matter for decision by the Court. It thus follows that defendant cannot use the Court's ruling to show that trial counsel's assistance was constitutionally ineffective.

Defendant's assertion that trial counsel failed to effectively cross-examine key government witnesses is also without merit. The Government produced 37 witnesses. Of these, defendant's allegation concerns the testimony of one ballistics expert regarding the total number of bullets which could exhibit similar markings and chemical composition. On direct examination the expert stated that the number could be in the thousands. Under cross-examination by Mr. Timberlake, the expert stated that the number could be as few as 100-500. In retrospect, perhaps it would have been more advantageous to defendant had trial counsel declined to delve more deeply into the witness' opinion on this point. An attorney is not al-

ways certain what answers his or her questions will elicit, however, and the Court cannot find incompetency is demonstrated by this single example of cross-examination.

Mr. Lewis also claims trial counsel failed to conduct a thorough investigation of the case. Had Mr. Timberlake done so, defendant argues, he would have located several individuals who could substantiate the alibi defense. At the hearing, defendant testified that he furnished Mr. Timberlake the name of one Sheila Hoffman, a person whose testimony would have supported defendant's claim that he had had the gold coin prior to the date of the homicides. Defendant also testified that Mr. Timberlake advised him that Hoffman had been subpoenaed, when in fact this was untrue. Mr. Lewis asserts that trial counsel failed to secure the testimony of Constance Cante, a co-worker of defendant at NU-Look Cleaners; of two employees at Pierre's Delicatessen who knew defendant's whereabouts during the time the offenses were being committed; of Mr. Lewis' half-way house counsellors that defendant had owned the coin prior to commission of the offenses; and of defendant's mother to the effect that he was at work at all times material to the offenses. Mr. Lewis also argues that trial counsel was derelict in failing to secure as evidence his time cards, which would have corroborated his alibi.

Mr. Timberlake flatly denied that defendant ever supplied the name of Sheila Hoffman. Mr. Lewis did provide the names of the counselors, both of whom were interviewed, and both of whom denied any knowledge of the coin. As to the delicatessen employees, Mr. Timberlake states that defendant did not know their names or physical descriptions, and

had only stopped in for coffee. Prior to that date, defendant advised counsel that he had been in the delicatessen on two other occasions. In Mr. Timberlake's view, these persons would not have assisted defendant in any way, given the strength of the Government's case against Mr. Lewis. Ms. Hoffman was not presented as a witness at the instant hearing. The time cards were presented but they appear of no value to defendant's alibi defense.

At the hearing Ms. Cante testified that Mr. Timberlake had not contacted or interviewed her. Mrs. Lewis testified that counsel advised her that she would not testify at trial because she was a government witness. The Government appended the grand jury testimony of both women to its opposition to this motion. A review of these transcripts plainly shows that Ms. Cante contradicted Mrs. Lewis on several critical points which tended to negative defendant's alibi. Mrs. Lewis would have testified that she and her son were working in the cleaners at all times relevant to the offenses and that the necklace found to belong to a matched set of jewelry owned by one of the victims, was in fact her property. Defendant and his mother claim the time cards would have verified their whereabouts. Ms. Cante's grand jury testimony indicated that there were occasions during the week the offenses were committed when defendant was late or absent from work, and Mrs. Lewis was also away from the cleaning shop. Further, in sharp conflict with Mrs. Lewis' testimony, Ms. Cante testified that employees could leave the premises without being seen by other employees, and that time cards could be punched by a person other than the employee to whom it belonged. The Government had

custody of the time cards in question. Ms. Cante also testified to the grand jury that she had seen defendant and Arthur Byrd conferring on the shop premises on at least two occasions relevant to the time of the offenses.

Mr. Timberlake testified he did not call Mrs. Lewis because it was his belief and judgment that she could not corroborate defendant's alibi without committing perjury. It was also his judgment that impeachment of Mrs. Lewis was far more damaging. As previously noted, Ms. Cante's testimony before the grand jury tended to negative defendant's alibi. Unless Ms. Cante were to perjure herself, the Court discerns no loss of a substantial defense as a matter of law occasioned by Mr. Timberlake's failure to call these individuals to the stand.

Finally, defendant faults Mr. Timberlake for the Court's decision not to allow new counsel for defendant to actively participate in the trial of the matter. Trial had been continued once at the instance of previous counsel for defendant, resulting in a postponement of several months. New counsel moved to enter his appearance after the pretrial and on the eve of a very difficult and lengthy trial. The Court denied the motion as counsel indicated his appearance would be entered only if a continuance were granted. On the morning that trial commenced, yet another attorney moved to enter an appearance which was granted on the condition that no continuance would be allowed. This attorney voluntarily withdrew his appearance during the first day of trial.

The testimony at the hearing was very conflicting, as set forth above. Defendant's testimony was vague at points, seemingly rehearsed at others. Mrs. Lewis'

testimony seemed contrived solely to aid and corroborate her son's allegations.

The Court finds that the allegations of Mr. Timberlake's failure to prepare and to communicate with Mr. Lewis have not been proved and concludes that trial counsel was well prepared for trial and effectively communicated with his client.

The manner of presentation of Mr. Lewis' case and the allegations of tactical errors are likewise found to be without merit and unproved. Surely, in retrospect, questions may have been asked differently or not asked at all. Certain witnesses for defendant may not have been called to testify or witnesses who then appeared marginal may have been called. This may even now be the view of trial counsel, but trial counsel was required to make these decisions before and during the trial and he was required to consider many intangibles—including the dynamics of this particular trial. The decisions and the tactical determinations made could only be made by trial counsel. There is no evidence that the decisions he made violated defendant's constitutional right to effective assistance of counsel.

After careful review and consideration of defendant's motion, the Government's opposition thereto, and the hearing thereon, the Court finds and concludes as a matter of law that defendant has failed to prove by a preponderance of the evidence that the performance of trial counsel was grossly incompetent and that such gross incompetence resulted in ineffective assistance of counsel such that defendant was deprived of a substantial defense or the essence of a substantial defense.

Accordingly, it is this 23rd day of January, 1979, ORDERED that defendant's motion be, and hereby is, DENIED.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
Judge

Copies to:

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